

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARIA D. HERNANDEZ

Claimant

VS.

POSTAL PRESORT

Respondent

AND

EMPLOYERS MUTUAL CASUALTY COMPANY

Insurance Carrier

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Docket No. 1,022,505

ORDER

Respondent and its insurance carrier (respondent) appealed the June 13, 2005, preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

Claimant alleges she injured her back by lifting heavy sacks and trays of mail while working for respondent. In the June 13, 2005, preliminary hearing Order, Judge Klein granted claimant's request for temporary total disability benefits.

Respondent contends Judge Klein erred. Respondent requests the Board to determine whether claimant proved she injured her back in an accident that arose out of and in the course of her employment with respondent. Respondent also argues the Judge erred by granting claimant temporary total disability benefits as she was allegedly terminated for cause.

Conversely, claimant requests the Board to affirm the preliminary hearing Order.

The only issue before the Board on this appeal is whether claimant injured her back working for respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the Board finds and concludes the June 13, 2005, Order should be affirmed.

Respondent first requests the Board to determine if claimant sustained personal injury by accident arising out of and in the course of her employment with respondent. In the preliminary hearing Order, the Judge did not specifically address that issue. And it is not clear from the preliminary hearing transcript that the parties raised the issue before the Judge. In opening comments at the June 9, 2005, preliminary hearing, respondent's counsel mentioned he did not know whether it had been established that claimant had been injured at work. But that issue was not addressed by the parties in their closing arguments to the Judge. For future reference, the parties should be more explicit when stating the issues.

Nonetheless, the Board finds for preliminary hearing purposes that claimant has proven she either injured or aggravated her back working for respondent. Claimant testified how she lifted heavy sacks and trays of mail and developed back pain. Moreover, the medical notes from Dr. Robert L. Eyster, whom respondent selected to treat claimant, indicate claimant's work had aggravated degenerative disc disease in her back.

An injury is compensable under the Workers Compensation Act when an accident at work aggravates a preexisting condition.¹ The test is not whether the accident caused the preexisting condition but, instead, whether the accident aggravated or accelerated it.²

Respondent also argues the Judge erred by granting claimant temporary total disability benefits when claimant was fired for allegedly missing work. But the issue of whether an injured worker meets the statutory definition of being temporarily and totally disabled, which would entitle them to receive temporary total disability benefits, is not an issue or finding the Board has jurisdiction to review from a preliminary hearing order. See K.S.A. 44-534a.

Respondent also argues in its brief filed with the Board that claimant failed to prove she provided timely notice to respondent. That was not an issue raised to the Judge. Accordingly, the Board will not consider it for the first time on appeal. See K.S.A. 44-555c(a).

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.³

¹ *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

² *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

³ K.S.A. 44-534a(a)(2).

WHEREFORE, the Board affirms the June 13, 2005, preliminary hearing Order entered by Judge Klein.

IT IS SO ORDERED.

Dated this ____ day of August, 2005.

BOARD MEMBER

c: Tamara J. Collins, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director